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No. 92-1179

In the Supreme Court of the United States

OCTOBER TERM, 1992

JEROME ISODORE KAHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a person may be convicted of engaging in a continuing criminal enterprise based upon his conduct in repeatedly aiding and abetting the illegal manufacture of methamphetamine by operating a business that sold large quantities of precursor chemicals to those who illegally manufactured the methamphetamine.

2. Whether petitioner's assertion that the government was estopped from prosecuting him entitled him to discovery of (1) internal government documents that he had never seen and did not rely upon, and (2) other government documents concerning an alleged conversation between a DEA agent and a business associate of petitioner's.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is unpublished, but the judgment is noted at 977 F.2d 593 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1992. The petition for a writ of certiorari was filed on January 11, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Southern District of California, petitioner was found guilty on

one count of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848(c). Petitioner also pleaded guilty to one count of conspiring to structure monetary transactions, in violation of 18 U.S.C. 371 and 31 U.S.C. 5324(3). He was sentenced to 26 years' imprisonment. The court of appeals affirmed.

1. In February 1985, petitioner purchased and began operating Quantum Laboratory Supply, a retail chemical and glassware supplier. Petitioner operated a number of Quantum stores in several cities in California and Nevada. The principal business of the stores was the sale of glassware and precursor chemicals, including ephedrine, hydriotic acid, and red phosphorous, for the clandestine manufacturing of methamphetamine. Quantum customers manufactured hundreds of individual batches of methamphetamine using chemicals and glassware purchased at Quantum stores. Between 1985 and 1987, petitioner made a profit of three to four million dollars. Pet. App. B3-B4; Pet. 5-7.

Petitioner and his employees had reasonable cause to believe that the majority of Quantum's customers were buying the chemicals and glassware in order to manufacture methamphetamine illegally. Some of Quantum's customers were regulars, who ordered the chemicals and glassware using drug slang, such as "fifty-liter set-up" to refer to the glassware needed to manufacture 50 liters of methamphetamine, and "white," "red," and "acid" to refer to ephedrine, red phosphorous, and hydriotic acid, the three principal chemicals used to manufacture methamphetamine. Quantum employees would on occasion respond to customers' questions about glassware and equipment

so as to enable the customers to manufacture methamphetamine in a more expeditious or safer manner, but they were instructed not to give advice concerning the chemical procedures used in manufacturing methamphetamine. Pet. App. B4; Pet. 6-8.

In late 1986, San Diego County, California, enacted reporting requirements and a mandatory waiting period for the purchase of ephedrine. As a result, Quantum employees at the main Quantum store in San Diego County told customers to go to a Quantum store in Orange County to purchase ephedrine. The State of California enacted ephedrine reporting requirements in 1987. Petitioner then opened a large warehouse in Henderson, Nevada, and began referring customers there. When law enforcement agents searched the Nevada warehouse, petitioner opened a store in Salt Lake City, Utah, to sell ephedrine. He also stored large quantities of ephedrine in Utah in the expectation that ephedrine would become illegal and its price increase ten-fold. Pet. App. B4-B5; Pet. 7-8.

In 1987, petitioner became concerned that law enforcement authorities were looking at Quantum's operations. He therefore began to put the names of other individuals on the titles to several of his stores. He also took steps to establish a shell corporation in Mexico that would appear to own the Quantum stores. Pet. 7. Petitioner was a fugitive from May 20, 1988, when law enforcement authorities executed search warrants on the various Quantum facilities, until his arrest in April 1990. Pet. 8.

2. Petitioner was tried on a record consisting of stipulated facts (Pet. 5-8) and grand jury transcripts.

Pet. App. B2. He was convicted of CCE and conspiracy to manufacture methamphetamine.

Petitioner raised two legal challenges to the CCE charge. First, he asserted that the facts were legally insufficient to support the CCE charge because they did not establish his involvement in any drug conspiracies. Second, he claimed that a CCE violation cannot be predicated upon accessorial liability. Pet. App. B2, B5. The district court rejected both contentions. *Id.* at B5-B18.

Petitioner relied on *United States* v. *Falcone*, 311 U.S. 205 (1940), in support of his claim that the facts were legally insufficient to convict him of a CCE violation based on a series of drug conspiracies. In *Falcone*, the defendants sold large quantities of sugar, yeast, and cans to customers they knew would use the materials to distill illegal alcohol. *Id.* at 208. The defendants were convicted of conspiracy to violate revenue laws by operating illegal stills. *Id.* at 206-207. This Court reversed, holding that "one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge." *Id.* at 210-211.

In response, the government argued that this Court's decision in *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943), which clarified *Falcone*, controlled petitioner's case. The defendant in *Direct Sales* was a corporation that sold large quantities of prescription drugs to a doctor, who then sold the drugs illegally. 319 U.S. 705-706. The Court upheld the corporation's conviction for conspiracy; it held that the corporation's unlawful intent was established

by the nature of the materials at issue (regulated drugs, as opposed to the sugar that was involved in *Falcone*), the quantity of drugs purchased by the doctor, and the corporation's volume discounts and high pressure sales tactics. *Id.* at 710-713.

The district court held that petitioner's case was similar to *Direct Sales*, because the stipulated facts were sufficient to establish the requisite intent for conspiracy. Pet. App. B11-B15. The court noted that ephedrine, the main chemical sold by petitioner, had virtually no legitimate use other than in the manufacturing of nasal decongestants. It was therefore more like the prescription drugs in *Direct Sales* than the sugar in *Falcone*. Pet. App. B12. The court also pointed to the large quantities of drugs sold, the repeat business in chemicals used to manufacture illegal drugs, the customers' suspicious appearance and use of slang drug terminology, the quantity price discounts, and the measures taken by petitioner to avoid reporting requirements. Each of those factors, the court held, helped establish that petitioner was guilty of acting in concert with others to manufacture large quantities of methamphetamine over a long period of time. *Id.* at B12-B15.

The district court also rejected petitioner's claim that he could not be convicted of a CCE violation on an aiding and abetting theory. Pet. App. B15-B18. The court explained that petitioner was not convicted of CCE for assisting another in supervising or managing the business, but rather because he was himself a drug "kingpin" whose series of predicate violations consisted of aiding and abetting others in the commission of drug offenses. *Id.* at B17-B18.

3. On appeal, petitioner argued that the district court erred in denying his request for discovery of various government documents relevant to a defense of reliance on official statements that his conduct was legal, and he renewed his claim that he did not commit a CCE violation. Pet. App. A1-A2. The court of appeals held that the district court did not abuse its discretion in denying petitioner's discovery request for internal government memoranda, because petitioner never claimed to have read or possessed any such memoranda. *Id.* at A3. The court also held that the district court did not abuse its discretion in denying petitioner's request for documents relating to an alleged conversation between petitioner's former partner and a DEA special agent, because any such documents would not demonstrate that petitioner was affirmatively misled into believing that his conduct did not violate the law. *Id.* at A4-A5.

The court affirmed petitioner's CCE conviction, holding that he "is a kingpin in his own right" and that he aided and abetted a series of predicate drug violations. Pet. App. A9-A10. The court relied on its decision in *United States* v. *Miskinis*, 966 F.2d 1263 (9th Cir. 1992), in holding that aiding and abetting the manufacture of methamphetamine is a predicate offense under the CCE statute. Pet. App. A7-A10.

ARGUMENT

1. Petitioner contends (Pet. 18-23) that Congress did not intend the CCE statute to reach an operator of a "legitimate" supply company whose only connection to the illegal drug business is its sale of raw materials used to manufacture illegal drugs. Nothing in either the statute or the legislative history

suggests that, despite sufficient proof to satisfy all of the elements of the CCE offense, a supplier of raw materials for an illegal drug operation may not be convicted of a CCE violation.[1] Petitioner notes (Pet. 19) that this Court has stated that the CCE statute was "designed to reach the 'top brass' in the drug rings," as opposed to the lieutenants and foot soldiers. *Garrett* v. *United States*, 471 U.S. 773, 781 (1985). An individual like petitioner whose conduct satisfies each of the statutory elements, however, is aptly characterized as a member of the "top brass." Nothing in *Garrett* suggests that a defendant is immune from liability because his operation assisted the illegal manufacture of "hundreds" of batches of drugs (Pet. 7) but did not do the actual manufacturing.

There was ample evidence that petitioner's conduct was far more egregious than his claim that "at worst, during the course of his lawful business, petitioner's employees sold materials later used by drug manufacturers to create controlled substances." Pet. 22. Petitioner stipulated that he and "all" of his employees had "reasonable cause to believe" that the majority of his customers purchased chemicals and glassware from him "in order to illegally manufacture methamphetamine." Pet. 6. Petitioner sold

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[1] To convict a defendant of a CCE violation, the government must prove that the defendant committed a predicate drug offense that was part of a continuing series of predicate drug offenses undertaken by him in concert with five or more other persons, that he occupied the position of an organizer or manager with respect to those individuals, and that he obtained substantial income or resources from the continuing series of violations. 21 U.S.C. 848(c); see *Garrett* v. *United States*, 471 U.S. 773, 786 (1985).

large quantities of chemicals such as ephedrine, which had no legitimate use other than in the manufacture of nasal decongestants; he gave price discounts based on quantity; and his employees gave customers—many of whom looked like drug dealers and used drug slang—advice on glassware and equipment that would enable them to manufacture illegal methamphetamine in a more expeditious and safe manner. Petitioner also took significant measures—such as relocating his operations—to avoid the reporting requirements instituted by San Diego County and the State of California. Pet. App. B12-B15. Those facts were sufficient to establish that he intentionally aided and abetted his customers' methamphetamine manufacturing operations.

2. Petitioner correctly asserts (Pet. 23-35) that the courts of appeals are divided over whether a defendant who aids and abets a CCE violator and drug kingpin may himself be convicted of the CCE offense. Compare, *e.g.*, *United States* v. *Amen*, 831 F.2d 373, 381-382 (2d Cir. 1987) (CCE liability does not extend to an aider and abettor of the person in charge of the enterprise), cert. denied, 485 U.S. 1021 (1988), with *United States* v. *Pino-Perez*, 870 F.2d 1230, 1231-1237 (7th Cir.) (en banc) (aider and abettor liability attaches to all federal criminal statutes, and one who aids and abets drug kingpin can be guilty of CCE offense), cert. denied, 493 U.S. 901 (1989). This case presents no opportunity to resolve that circuit conflict, however, because petitioner was not convicted of aiding and abetting a violation of 21 U.S.C. 848. Rather, petitioner was convicted of engaging in a continuing criminal enterprise himself, based upon

his conduct in aiding and abetting the commission of a number of drug violations.

Petitioner argues that the CCE statute should not be extended to an outside supplier such as himself whose predicate offenses all rest on an aiding and abetting theory. Section 2 of Title 18, however, expressly provides that whoever aids and abets the commission of an offense against the United States is "punishable as a principal." 18 U.S.C. 2(a). It is well settled that, with some exceptions not pertinent here, the aiding and abetting statute is "applicable to the entire criminal code." *Pino-Perez*, 870 F.2d at 1233; *United States* v. *Jones*, 678 F.2d 102, 105 (9th Cir. 1982); *Breeze* v. *United States*, 398 F.2d 178, 192 (10th Cir. 1968). Those courts of appeals that have specifically addressed whether CCE liability extends to a kingpin who aids and abets drug offenses have agreed that it does. See, *e.g.*, *Miskinis*, 966 F.2d at 1267-1268; *United States* v. *Aiello*, 864 F.2d 257, 264 (2d Cir. 1988). In fact, because drug kingpins are often removed from direct involvement in the drug activities that they manage or supervise, a rule prohibiting the use of aiding and abetting as a basis for CCE liability could insulate some of the very defendants that the CCE statute was designed to reach.

3. Petitioner also contends (Pet. 35-40) that the courts below misapplied this Court's decisions in *Falcone* and *Direct Sales* in concluding that he had the requisite intent to be guilty of conspiracy.

The Court in *Falcone* affirmed the court of appeals' reversal of the conspiracy convictions of several sugar distributors who sold sugar and other items to illicit distillers. 311 U.S. at 210-211. The Court held

that "one who *without more* furnishes supplies to an illicit distiller is not guilty of conspiracy." *Ibid.* (emphasis added). In *Direct Sales*, the Court affirmed a corporation's conspiracy conviction for supplying large quantities of prescription drugs to a doctor who then sold them illegally. 319 U.S. at 704-705, 707-708. The Court held that the evidence against the corporation demonstrated unlawful intent, not mere knowledge of the doctor's illicit purposes: the defendant sold regulated, prescription drugs to the doctor in vast quantities, gave volume discounts, engaged in high pressure sales tactics, and had a stake in the doctor's venture because it made profits it knew could only come from encouraging the doctor's illegal operation. *Id.* at 710-713. Thus, the Court in *Direct Sales* distinguished *Falcone*, in which the commodity at issue was an article "of normal trade" and the evidence regarding volume of sales and meetings between the distributors and distillers was "vague and uncertain." 319 U.S. at 709-711. See *United States* v. *Michelena-Orovio*, 719 F.2d 738, 750-751 (5th Cir. 1983) (en banc), cert. denied, 465 U.S. 1104 (1984). See also *United States* v. *Montanye*, 962 F.2d 1332, 1342-1343 (8th Cir.) (glassware vendor guilty because he knowingly aided an illegal drug conspiracy), certs. denied, 113 S. Ct. 418 and 113 S. Ct. 496 (1992).

As the district court held, petitioner's case is controlled by *Direct Sales*, not *Falcone*. Pet. App. B11. While the chemicals sold by petitioner were not inherently harmful or controlled, they had little recognized legal use; the district court found that the primary chemical sold by Kahn—ephedrine—"has

virtually no legitimate use." *Id.* at B12.[2] Petitioner sold large quantities of the chemicals, resulting in hundreds of batches of illegal methamphetamine. *Ibid.* That petitioner had a stake in the venture is demonstrated by his efforts to avoid the reporting requirements by moving his primary operations several times, to inform his customers which Quantum stores would sell the chemicals free of the reporting requirements, and to offer discounted prices based upon volume. *Id.* at B13-B14. Those facts are sufficient to establish intent under *Direct Sales* and *Falcone*.

4. Petitioner claims (Pet. 41-55) that he was erroneously denied discovery of internal government documents concerning the legality of selling precursor chemicals and DEA reports concerning contacts between the DEA and petitioner's staff.

Contrary to petitioner's contention, the government documents petitioner sought were not material to an "equitable estoppel" defense. Petitioner does not claim that he ever saw, read, or possessed any government documents relating to the legality of selling precursor chemicals. Petitioner therefore cannot argue that he relied upon any such documents in continuing to sell the precursor chemicals.[3] See

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[2] See *Direct Sales*, 319 U.S. at 710 ("All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully.").

[3] This case is thus distinct from cases in which a defendant claims that he actually relied upon affirmative representations by government agents. See, *e.g.*, *United States* v. *Pennsylva-*

Pet. App. A3. Thus, if an "equitable estoppel" defense were available to petitioner, the government documents petitioner seeks—if any exist—would not be material to his claim and would not be discoverable. See *United States* v. *Agurs*, 427 U.S. 97, 104 (1976) (evidence material if it "might have affected the outcome of the trial"); *United States* v. *Maniktala*, 934 F.2d 25, 28 (2d Cir. 1991) (evidence not material unless its pretrial disclosure would have enabled defendant significantly to alter the quantum of proof in his favor); *United States* v. *Reeves*, 892 F.2d 1223, 1226 (5th Cir. 1990) (same); *United States* v. *Dupuy*, 760 F.2d 1492, 1501 n.3 (9th Cir. 1985) ("Materiality is the touchstone in the determination of whether evidence qualifies as *Brady* material.").

Petitioner's claim that he was entitled to discovery of DEA documents relating to contacts between a DEA agent and members of petitioner's staff is similarly unavailing. Petitioner contends (Pet. 50-51) that a DEA agent told his former partner (who is now deceased) that it was not illegal to sell precursor chemicals. Even if the statement was made, evidence of the statement would not have helped petitioner. Petitioner was not charged simply with selling precur-

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nia Indus. Chem. Corp., 411 U.S. 655, 670-673 (1973) (defendant claimed he was affirmatively misled by agency's interpretation of law in published regulation); *Cox* v. *Louisiana*, 379 U.S. 559, 569-572 (1965) (defendant prosecuted for demonstrating near courthouse had been told by police chief that he could demonstrate where he did); *United States* v. *Clegg*, 846 F.2d 1221, 1224 (9th Cir. 1988) (defense based upon claim that reasonable good faith reliance on statements of United States officers led defendant to believe he was lawfully transporting guns).

sor chemicals, but rather with knowingly and intentionally participating in the illegal manufacture of drugs. Petitioner does not and cannot claim that he or any member of his staff was told by a DEA agent that it was legal to assist the illegal manufacturers of methamphetamine. Thus, petitioner was not affirmatively misled into believing that his conduct was legal, and the DEA documents he sought prior to trial were not material to his defense. In any event, the DEA agent who purportedly spoke with petitioner's partner denied telling him the sales were legal, and the government denied that there were any DEA documents falling within petitioner's request. See Pet. App. A6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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